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Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO, ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI and ROBERT TORKAR.

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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STATUTES AND RULES INVOLVED

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), and §§ 9(e), 10(b) and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78(j)(b) and 78r, and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1992).

STATEMENT OF THE CASE

In December 1983, Cousins Home Furnishings, Inc. ("Cousins") made an initial public offering of stock. *See* Joint Appendix ("J.A.") pp.14-15, ¶23. The stock was then traded in the open market. J.A. pp.14-15, ¶23. The prospectus for the initial public offering was written by a prominent law firm, Musick, Peeler & Garrett, which had guided Cousins through the entire public offering process. *See* J.A., p.17, ¶30 through p.23, ¶33. Members of a prominent national accounting firm, Main Hurdman, prepared the financial disclosures necessary for the prospectus. J.A. p.23, ¶34 through p.30, ¶40(e).

After negative information about Cousins was publicized, its shares dropped precipitously in value. *See* J.A. p.14, ¶23 through p.15, ¶23. The Cousins case (*"Cousins"*), a Rule 10b-5 fraud-on-the-market class action, promptly followed. The plaintiff class sued Cousins, its affiliate RB Furniture, certain of the public offering underwriters, and numerous Cousins directors and officers. *See* J.A. pp. 14-15, ¶23. The complaint in *Cousins* asserted violations of §§ 11, 12(2) and 13(b)(3) of the Securities Act of 1933, § 10(b) and Rule 10b-5 of the Securities Exchange Act, common law claims of fraud and negligent misrepresentation, and violations of §§ 1507, 2254, 25400, 25401, 25500 and 25501 of the California Corporations Code. J.A. p.14, ¶23 through J.A. p.14, ¶23.

Remarkably, counsel for the *Cousins* plaintiff class chose not to sue Cousins' accountants (Main Hurdman and J.H. Cohn) or lawyers (Musick, Peeler & Garrett).

The *Cousins* defendants and Respondents have always contended, however, that Cousins' lawyers and accountants were primarily responsible for the alleged

loss to the class. Specifically, for example, Cousins' lawyers drafted a prospectus without any "risk disclosure" section despite the high-risk nature of Cousins securities. J.A. p.19, ¶33(a). Also, Cousins' accountants materially changed the manner of accounting for revenue recognition, without disclosing same, thus artificially inflating Cousins' revenues and net income. J.A. p.28, ¶40(a) through J.A. p.30, ¶40(e).

Respondents Employers Insurance of Wausau ("Wausau") and Federal Insurance Company ("Federal"), provided indemnity insurance to all but two of the *Cousins* defendants. As part of a comprehensive settlement of the *Cousins* litigation, involving *all* defendants sued, Wausau and Federal contributed $13 million towards satisfaction of a $13.5 million settlement of *Cousins*. J.A. at p.16, ¶28.

Within one year after the settlement, Wausau and Federal initiated the present action as subrogees of their insureds. J.A., p.4, ¶1. The action asserts claims for contribution under Securities Act of 1933 § 11(f), Securities Exchange Act § 10(b), and comparative equitable indemnity under California state law, against Cousins' highly culpable lawyers and accountants. Section 11(f) leaves a gap in the securities laws as illustrated by the facts of this case. Because the lawyers were not named in the prospectus, nor did they expertise any portion thereof, they cannot be sued for contribution under § 11(f).

This action was brought because Cousins' lawyers and accountants were primarily responsible for causing the damages alleged by the *Cousins* plaintiff class, but paid nothing to compensate the victims of their deceit. J.A. at p.16, ¶28.

The trial court granted a motion to dismiss Wausau and Federal's First Amended Complaint herein with prejudice. Dismissal was ordered on the erroneous grounds that the settling *Cousins* defendants had been determined, in a good faith settlement procedure, to have paid their "fair share" of the liability to the plaintiff class, and therefore could not pursue contribution against non-party tortfeasors.

The Ninth Circuit reversed the trial court, finding that the prior procedure signified only that the *Cousins* defendants had paid their fair share *inter se*, and not vis-a-vis non-party tortfeasors, such as Petitioners.

Neither the trial court nor the Ninth Circuit ever questioned the settled proposition that a right of contribution exists under § 10(b) or Rule 10b-5. No such issue needed to be addressed at any earlier stage of this case, because the existence of that right of contribution was already settled law in the Ninth Circuit. *See Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987).

This Court granted a Petition for Certiorari to review one issue: Whether a private right of action for contribution may be recognized under § 10(b) and Rule 10b-5.

SUMMARY OF ARGUMENT

This Court has already determined in its *in pari delicto* cases, that suits between wrongdoers are appropriate to effectuate the purposes of the securities laws. Congressional intent to permit such suits, as reflected in three express contribution sections as well as congressional oversight, and explicit approval of all implied rights of action under § 10(b) and Rule 10b-5, clearly supports the right to contribution.

A. Contribution Is Well-Established. Contribution under Securities Exchange Act § 10(b) and Rule 10b-5 has been recognized by the courts starting in 1968, and is the overwhelmingly predominant rule. At present, there are 45 cases from all but the Eighth and Eleventh Circuits recognizing contribution. There are only five cases – four district court cases (two unpublished) from the Seventh and Eighth Circuits and one case from the Eighth Circuit itself – which do not recognize contribution. This Court should not discard the great weight of precedent supporting the right of contribution.

B. The Statutory Language Supports Contribution. The Securities Exchange Act and its companion Securities Act of 1933 contain explicit contribution provisions in their

express private rights of action which, like § 10(b) and Rule 10b-5, involve scienter. These contribution provisions indicate a determination by Congress that suits between wrongdoers for contribution will further the purposes of the securities laws.

C. The Legislative History Supports Contribution. In reconsidering private actions under § 10(b) and Rule 10b-5 in preparing the Insider Trading and Securities Fraud Enforcement Act of 1988, Congress clearly and with purpose set forth in written legislative history: (1) its approval of existing court-made law defining the scope of the § 10(b) private rights of action (including contribution), (2) its approval of the process of judicial development of the § 10(b) private rights of action, and (3) a congressional mandate to the courts to continue "to develop such private rights of action in an expansive fashion in the future."

D. The Legislative Scheme Supports Contribution. The overall scheme of the securities laws supports contribution, because it reflects a congressional intent to deter wrongdoing and protect securities markets rather than merely to punish. Congress thus determined, as reflected in the explicit contribution provisions in those laws, that the beneficial deterrent value of bringing additional parties to justice through contribution outweighs any drawbacks of lessening the liability of the wrongdoers receiving contribution.

E. Congress Mandated Contribution Between Intentional Wrongdoers "as in Cases of Contract." The express language of the three contribution sections in the securities laws, and the roots of the § 10(b) cause of action in the contract between the buyer and seller of securities, makes plain that Congress intended wrongdoers to obtain contribution.

F. This Court Has Already Determined That Suits Between Wrongdoers Under § 10(b) and Rule 10b-5 Are Proper. In its decisions restricting the *in pari delicto* defense under § 10(b) and Rule 10b-5, this Court has determined that

suits between wrongdoers serve to further important purposes of the securities laws.

G. Policy Considerations of Deterrence, Fairness and Promotion of Investor Confidence Support Contribution.

H. The Holdings of Northwest Airlines *and* Texas Industries *are Confined to the Specific Statutory Schemes Therein.* Title VII and the antitrust laws, under which contribution was refused in those cases, are completely distinguishable from the securities laws in general, and § 10(b) and Rule 10b-5 in particular.

First, the securities laws contain express contribution provisions, reflecting congressional intent to permit contribution under those laws. The antitrust laws and Title VII do not contain express contribution provisions.

Second, unlike the antitrust laws and Title VII, which were aimed at punishing wrongdoers, the securities laws were designed to protect the securities markets as a whole. The securities laws, *unlike the antitrust laws and Title VII*, thus contain specific provisions permitting wrongdoers to sue for contribution, relying upon contribution's deterrent effect even if punishment is thus lessened.

Third, the securities laws, unlike the antitrust laws and Title VII, are not comprehensive so as to exclude implied remedies. The implied rights of action under § 10(b) and Rule 10b-5 have arisen out of necessity to fill in major gaps in the securities laws.

Moreover, court holdings subsequent to *Texas Industries* and *Northwest Airlines* have read these cases as confined to the statutes dealt with therein, and as not restricting contribution under § 10(b) and Rule 10b-5.

ARGUMENT

I.

CONTRIBUTION IS A WELL-ESTABLISHED RIGHT UNDER THE SECURITIES EXCHANGE ACT § 10(b)

A. Contribution Is The Prevailing Rule In United States Jurisdictions

Contribution is an equitable doctrine which allows defendants to require joint wrongdoers, even those not named by the plaintiff, to bear their fair burden of the plaintiff's damage award. *Nelson v. Bennett*, 662 F. Supp. 1324, 1327-28 (E.D. Cal. 1987). "Typically a right of contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981).

Today contribution is recognized in most American jurisdictions by either statute or judicial decision. *Id.* at 86-87.[1] The traditional common law rule barring contribution between joint tortfeasors gradually eroded because it was unfair to require one defendant to bear the entire loss resulting from injury that he or she had not alone caused, or to permit the plaintiff for whatever motive, benign or invidious, to select one defendant from whom he or she wished to recover. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 537 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983).

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[1] In 1981, thirty-nine states plus the District of Columbia recognized some form of the right to contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 88 n.17.

Since 1981 seven more states have recognized contribution among joint tortfeasors. See A.R.S. § 12-2501 to § 12-2509 (Arizona); M.C.A. § 27-1-703 (1985) (Montana); R.S.A. § 507:7-d to -i (New Hampshire); Ohio R.C. § 2307.31; 12 Okla. Stat. § 832 (1981); South Carolina Code Ann. § 15-38-10 through § 15-38-70 (Supp. 1990); and RCW 4.22.040 (Washington). Only four states remain without such contribution.

B. Contribution Is Overwhelmingly Supported By Case Law Under § 10(b)

With the establishment of a private right of action[2] under the Securities Exchange Act of 1934 (the "Exchange Act § 10(b)") and SEC Rule 10b-5 (hereinafter collectively "§ 10(b)"), the courts continued defining the scope of § 10(b), including the remedies available to private parties damaged by violations of this section. *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 550 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991).

Starting in 1968 with *deHaas v. Empire Petroleum Company*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970), and continously to the present, federal courts have *routinely* and *consistently* held on at least forty-five occasions that an implied right of contribution exists under § 10(b).[3]

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[2] As early as 1946 a private right of action was implied under § 10(b) in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D.Pa. 1946). This Court addressed the issue a quarter of a century later and reaffirmed with little discussion the overwhelming consensus of the lower federal courts which had recognized a private right of action under § 10(b). *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

[3] **First Circuit:** District Courts – *In Re Atlantic Financial Management, Inc. Securities Litigation*, 718 F. Supp. 1012 (D. Mass. 1988); *MFS Mun. Income Trust v. American Medical Intern.*, 751 F. Supp. 279 (D. Mass. 1990). **Second Circuit:** Court of Appeals – *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721 (2d Cir. 1981); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982), *cert. denied*, 459 U.S. 838, *cert. denied*, 459 U.S. 908; *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). **District Courts** – *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972); *Herzfield v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Liggett & Myers Incorporated v. Bloomfield*, 380 F.

The sole exceptions to these forty-five decisions were

Supp. 1044 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Odette v. Shearson, Hammill & Co., Inc.*, 394 F. Supp. 946 (S.D.N.Y. 1975); *Rice v. McDonnell & Co., Inc.*, 442 F. Supp. 952 (S.D.N.Y. 1977); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180 (S.D.N.Y. 1979); *Noonan v. Granville-Smith*, 532 F. Supp. 1007 (S.D.N.Y. 1982), *opinion supplemented by* 535 F. Supp. 333 (S.D.N.Y. 1982); *Greene v. Emerson Ltd.*, 102 F.R.D. 33 (S.D.N.Y. 1983), *aff'd on other grounds, Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29 (2d Cir. 1984); *Jordan v. Madison Leasing Co.*, 596 F. Supp. 707 (S.D.N.Y. 1984); *Pepsico, Inc. v. Continental Cas. Co.*, 640 F. Supp. 656 (S.D.N.Y. 1986); *Dept. of Economic Dev. v. Arthur Andersen & Co.*, 739 F. Supp. 804 (S.D.N.Y. 1990); *In Re Crazy Eddie Securities Litigation*, 740 F. Supp. 149 (E.D.N.Y. 1990); *Dept. of Economic Devel. v. Arthur Andersen & Co.*, 747 F. Supp. 922 (S.D.N.Y. 1990); *McCoy v. Goldberg*, 778 F. Supp. 201 (S.D.N.Y. 1991); *In Re Crazy Eddie Securities Litigation*, 802 F. Supp. 804 (E.D.N.Y. 1992). **Third Circuit: District Courts** – *Gould v. American-Hawaiian Steamship Company*, 387 F. Supp. 163 (D.Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *B & B Investment Club v. Kleinhart's, Inc.*, 391 F. Supp. 720 (E.D.Pa. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D.Pa. 1975), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *McLean v. Alexander*, 449 F. Supp. 1251 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880 (D.N.J. 1984); *In Re National Smelting of New Jersey , Inc.*, 722 F. Supp. 152 (D.N.J. 1989). **Fourth Circuit: Court of Appeals** – *In Re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991). **District Courts** – *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 772 F. Supp. 1565 (D.S.C. 1991). **Fifth Circuit: Court of Appeals** – *Kuenhert v. Texstar Corporation*, 412 F.2d 700 (5th Cir. 1969); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd and rev'd in part on other grounds*, 459 U.S. 375 (1983). **District Courts** – *Marrero v. Abraham*, 473 F. Supp. 1271 (E.D.La. 1979); *In Re Terra-Drill Partnerships Securities Lit.*, 726 F. Supp. 655 (S.D.Tex. 1989). **Sixth Circuit: District Courts** – *Alexander Grant & Co. v. McAlister*, 669 F. Supp. 163 (S.D.Ohio 1987); *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D.Ohio 1990).

found in three published opinions[4] and two unpublished opinions[5] holding to the contrary.

C. The Leading Cases Establishing A Right To Contribution Are Carefully Reasoned

Court decisions supporting the right of contribution under § 10(b) are thoughtful and reasoned. The judiciary did not cavalierly imply a new right of action without exploring the basis for the right.

In *deHuas*, the first case to imply a right of contribution under § 10(b), the court reasoned that contribution should be permitted when liability is implied under

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Seventh Circuit: Court of Appeals – *Madigan, Incorporated v. Goodman*, 498 F.2d 233 (7th Cir. 1974); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979). **District Courts** – *In Re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597 (N.D.Ill. 1987). **Ninth Circuit: Court of Appeals** – *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990); *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987). **District Courts** – *Ahern v. Gaussoin*, 104 F.R.D. 37 (D.Or. 1984); *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D.Cal. 1987). **Tenth Circuit: District Courts** – *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D.Colo. 1989), *appeal dismissed without opinion*, 936 F.2d 582 (10th Cir. 1991); *deHaas v. Empire Petroleum Company*, 286 F. Supp. 809 (D.Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970). **District of Columbia Circuit: District Courts** – *In Re National Student Marketing Litigation*, 517 F. Supp. 1345 (D.D.C. 1981).

[4] *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124-25 (N.D. Ill. 1989).

[5] *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,500 at 93192-93193 (D. Minn. 1989); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,512 at 92,331 n.2 (W.D. Mo. 1991).

§ 10(b) because contribution is explicitly authorized by the express civil liability provisions of the securities laws. *deHaas*, 286 F. Supp. at 815-16.[6]

In *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), the next decision subsequent to *deHaas* to consider contribution under § 10(b), the court recognized that the general trend of current law was towards the allowance of contribution among joint tortfeasors, and thus followed *deHaas* in permitting a contribution action under § 10(b).

In *Heizer Corp. v. Ross*, 601 F.2d 330, 331-32 (7th Cir. 1979), the Seventh Circuit also upheld contribution under § 10(b). Relying in part on the existence of three other express contribution provisions in the securities laws, *Heizer Corp.* reasoned that such ancillary remedy should also be implied when the basic remedy was itself implied under § 10(b). In *Huddleston*, 640 F.2d at 557, the Fifth Circuit concluded that supporting contribution under § 10(b) promotes the objective of deterrence under the securities laws.

Thus, while this Court is properly examining herein the very recent dissent to the right of contribution, Respondents urge the Court to weigh the careful and deliberate efforts reflected in prior judicial determinations supporting the right of contribution under § 10(b).

A conservative approach to discarding such precedent is dictated not simply by the numerosity of judicial precedent, but further by the careful and deliberate nature of the reasoning reflected in that precedent.

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[6] These express contribution sections are Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f); Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i(e), 78r(b).

II.

IN 1988, CONGRESS: (1) EXPLICITLY APPROVED JUDICIAL DEVELOPMENT OF RIGHTS OF ACTION UNDER § 10(b); (2) EXPLICITLY RATIFIED EXISTING COURT-MADE LAW ON § 10(b) (INCLUDING CONTRIBUTION); AND (3) EXPLICITLY DELEGATED TO THE COURTS "LEEWAY TO DEVELOP SUCH PRIVATE RIGHTS OF ACTION IN AN EXPANSIVE FASHION IN THE FUTURE."

A. *Herman & MacLean* Directs Examination Of Post-Enactment § 10(b) Legislative History

In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court expressly found that Congress' continuing oversight of the securities laws constitutes ratification of the entire bundle of rights recognized by the courts under § 10(b). This Court held that the express remedy under § 11 of the Securities Act of 1933 did not preclude defrauded purchasers from maintaining an implied action under § 10(b) of the Exchange Act. *Id.* at 387. This Court recognized that prior to the massive revision of the securities laws in 1975 by Congress, "federal courts had *consistently* and *routinely* permitted a plaintiff to proceed under § 10(b) even where express remedies under § 11 or other provisions were available." *Id.* at 384-85. "In light of this well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress *ratified* the cumulative nature of the § 10(b) action." *Id.* at 386 (emphasis added).

This reasoning was also followed in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the very case that Petitioners principally rely on regarding congressional intent.[7]

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[7] In rejecting a finding of a private right of action under § 17(a) of the Exchange Act, Chief Justice Rehnquist, then Justice Rehnquist, noted that unlike the private right of action under § 10(b) that had at that time been accepted for 25 years by the

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355-56, (1982), this Court held that post-enactment legislative history must be examined in evaluating the scope of an implied right of action for fraud under the Commodity Exchange Act, a situation clearly analogous to the one at bar.

Merrill Lynch pointed out that this Court makes a different inquiry "when Congress acts in a statutory context in which an implied private remedy has already been recognized by the Courts" than "when Congress enacts new legislation." *Id.* at 378.

When new legislation is considered, the question is whether Congress intended to create a private remedy to supplement any express enforcement provisions of the statute. When examining congressional action under a statute already containing a judicially-recognized implied right of action, "the inquiry logically is different. *Congress need not have intended to create a new remedy, since one already exisied; the question is whether Congress intended to preserve the pre-existing remedy.*" *Id.* at 378-79 (emphasis added).

Merrill Lynch indicates that its reasoning applies to § 10(b).

> Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning Rule 10b-5, it was equally uniform and well understood.

Id. at 380.

The reasoning of *Herman & MacLean v. Huddleston* and *Merrill Lynch* indicates that: "[O]ur evaluation of Congressional action . . . must take into account its contemporary legal context." *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). "It is always appropriate to

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federal courts, there was no similar history of longstanding lower-court interpretation of § 17(a). *Touche Ross* at 577 n.19.

assume that our elected representatives, like other citizens, know the law." *Id.* at 696-97.

Accordingly, we must examine the post-enactment legislative history of the Exchange Act, a subject strenuously avoided by Petitioners and their *Amicus*.

B. Congress Has Expressly Approved The Full Scope Of Implied Rights Under § 10(b)

In enacting the "Insider Trading and Securities Fraud Enforcement Act of 1988," one of the most comprehensive revisions of the securities laws, Congress explicitly approved the full scope of rights recognized by the courts under § 10(b), the process of court development of law under § 10(b), and private enforcement of rights under § 10(b).[8] Such approval is contained in the legislative history of that 1988 law, House Report (Energy and Commerce Committee) No. 100-910 dated September 9, 1988, Cong. Record Vol. 134 (1988)[9] [hereinafter "Legislative History"].

1. Approval Of Rights Under § 10(b), Including Contribution

The Legislative History explained that "case law . . . has developed over time" interpreting the securities laws. "Section 10(b) of the Exchange Act, along with Rule 10b-5 promulgated by the Commission, has been subject to the *most extensive judicial interpretation*." Legislative History at 8 (emphasis added). In the Legislative History, "[t]he Committee in fact expressly recognizes the

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[8] In part, the bill extended civil penalties under Exchange Act § 21(d) to "controlling persons" who fail to adequately prevent insider trading; created new Exchange Act § 15f; amended § 32 of the Exchange Act to increase maximum jail term and fines; and passed § 20A of the Exchange Act to codify a private right of action for "contemporaneous traders."

[9] No Senate report was submitted with this legislation.

implied right of action under the securities laws including but not limited to the [misappropriation] case." Legislative History at 28.

Section 20A(d) of the Exchange Act, 15 U.S.C. § 78t-1(d), passed as part of the 1988 legislation, explicitly preserved all implied rights of action under § 10(b), stating:

> Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this title [the Exchange Act as a whole], or the availability of *any* cause of action implied from a provision of this title. (Emphasis added.)

When § 20A(d) was enacted, there were thirty-one cases supporting the right of contribution under § 10(b), and only one opposed. *See* footnotes 2 and 3, *supra*. Section 20A(d)'s explicit preservation of existing rights under § 10(b) provides direct and overwhelming evidence of legislative intent to preserve the implied right of contribution.

2. *Approval Of The Process Of Judicial Development Of Rights Under § 10(b)*

The Legislative History shows that Congress was relying on court-made law under § 10(b) to fulfill the purposes of the Exchange Act.

> In the view of the Committee, Section 10(b), Rule 10b-5, and other relevant provisions of the Exchange Act have sufficient flexibility to recognize and protect any person defrauded or harmed by a violation of any provision of this title [i.e. the entire Exchange Act] or the rules or regulations thereunder. . . .

Id. at 27.

In fact, Congress deleted an express right of action from the 1988 legislation which was redundant in light of the scope of § 10(b). This deletion was made to avoid restricting the scope of implied rights or freezing further court development of such rights:

> The Committee's intention in this amendment [deleting the express right] was to avoid creating an express private cause of action which might have the unintended effect of freezing the law *or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to give[n] [sic] the courts leeway to develop such private rights of action in an expansive fashion in the future.*

Ibid. (emphasis added).

Thus, Congress specifically approved judicial development of rights under § 10(b).

3. *Approval Of Private Enforcement Of Rights Under § 10(b)*

The Legislative History noted that "private rights of action have traditionally served as an important supplement to the Commission's enforcement of the federal securities laws," *Id.* at 26, quoting with approval then-SEC chairman Ruder, and stated that *"the Committee wanted to give[n] [sic] the courts leeway to develop such private rights of action in an expansive fashion in the future."* *Id.* at 27 (emphasis added). Thus Congress has approved enforcement of the § 10(b) prohibition of fraud through private actions.

C. Active Congressional Oversight Indicates Approval Of Judicial Interpretation Of The Securities Laws, Unless Limited By Congressional Amendment

Given the close congressional oversight of the securities laws, as well as the Legislative History cited above showing congressional intent to preserve judicial rulings under those laws, it would contravene congressional intent to limit the right of contribution under § 10(b). Such close congressional oversight is indicated both by legislative enactments, and Legislative History indicating congressional scrutiny of judicial decisions under the securities laws.

During the many years in which contribution has been a well-settled right under § 10(b), Congress has considered and passed ten major legislative amendments to the Exchange Act containing § 10(b).[10]

These many amendments indicate continuing congressional oversight of the securities laws. As problems arose, Congress responded. When tender offers became prominent, for example, Congress passed the Williams Act to regulate tender offers. The Market Reform Act of 1990, addressing problems of volatility in the securities

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[10] The major revisions of the Securities Exchange Act of 1934 during the period 1968 to the present, are:

1. P.L. 90-439 (1968): Williams Act to regulate tender offers;

2. P.L. 91-567 (1970): Williams Act amendment gives SEC regulatory authority under § 14(e) to define and proscribe fraudulent practices;

3. P.L. 94-29 (1975): Securities Acts Amendments of 1975 – provides for national market system for securities; provisions related to self-regulation of exchanges, municipal securities, regulation of clearing agencies and transfer agents;

4. P.L. 95-213 (1977): Foreign Corrupt Practices Act of 1977 – penalties to issuers who engage in foreign corrupt practices;

5. P.L. 98-376 (1984): Insider Trading Sanctions Act of 1984 – increases sanctions against insider trading;

6. P.L. 99-571 (1986): Government Securities Act of 1986 – provides for regulation of broker-dealers in government securities;

7. P.L. 100-704 (1988): Insider Trading and Securities Fraud Enforcement Act of 1988 – Provides private right of action based on contemporaneous insider trading;

8. P.L. 101-429 (1990): Penny Stock Reform Act – regulation of penny stock issuers and dealers;

9. P.L. 101-432 (1990): Market Reform Act of 1990 – permits SEC to suspend trading for protection of investors, and to limit practices which result in market volatility;

10. P.L. 102-242 (1991): Special statute of limitations provision for cases filed pre-*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991).

markets, was a direct response to the 1987 stock market crash.

Congressional oversight of the securities laws extended to legislative review of judicial decisions under those laws. For example, the Legislative History of the Insider Trading and Securities Fraud Enforcement Act of 1988 reflects that the legislation was aimed in part at confirming the validity of the "misappropriation" theory of insider trading, because of judicial uncertainty in applying that principle.

The Legislative History of the 1988 act was very specific in its discussion of judicial precedent. It discussed two Supreme Court cases which narrowed the breadth of the statutory and regulatory framework for insider trading (Legislative History at 10) and then focused on *Carpenter v. United States*, 484 U.S. 19 (1987), in which this Court divided in a 4-4 vote regarding the "misappropriation" theory of insider trading.

The Legislative History concluded that the misappropriation theory "should be encompassed within § 10(b) and Rule 10b-5," (*Id.* at 9-10), and pointed out that codification of the misappropriation theory was intended to overturn court cases precluding that theory of recovery. *Id.* at 26.

Congressional oversight indicates congressional awareness of the right of contribution and other implied rights under § 10(b).[11]

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[11] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts a statute without change . . . . [cases omitted.] So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Merrill Lynch*, 456 U.S. at 382 quoting *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Such congressional oversight further indicates approval of the right of contribution under § 10(b). Congress was deemed to have approved an implied cause of action under the Commodities Exchange Act, by enacting legislation in the "contemporary legal context" of that implied right (*Merrill Lynch*). *A fortiori*, Congress has approved the right of contribution under § 10(b) by its continuing legislative oversight and enactments in the "contemporary legal context" of the securities laws, including contribution. (*See* footnote 10, *supra*).

Moreover, Congress has never even considered, much less enacted, any measures to overturn the § 10(b) implied right of contribution under long-established, well-settled case law. Therefore, congressional intent, as expressed in its expansive reading of § 10(b), would be contravened by limitations on contribution.

III.

THE LEGISLATIVE SCHEME UNDER THE EXCHANGE ACT, INCLUDING THE EXPRESS CONTRIBUTION PROVISIONS THEREIN, IMPLIES A RIGHT OF CONTRIBUTION UNDER § 10(b)

A. Factors To Analyze In Ascertaining The Legislative Scheme

In addition to congressional intent (as discussed in Section II of this Brief), the courts should examine the following factors in order to ascertain whether the legislative scheme supports recognition of an implied right of action:

> The language of the statute itself, . . . the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or supplement existing state remedies.

Northwest Airlines at 91, citing *Cort v. Ash* 422 U.S. 66 (1975).

Analysis of these factors in connection with the Exchange Act indicates that the congressional scheme underlying the act supports a right of contribution under § 10(b).

B. The Express Statutory Language Indicates An Intent To Imply Contribution For Rights Of Action Involving Scienter

The Securities Act provides for contribution among joint wrongdoers in § 11(f), 15 U.S.C. § 77k(f). The Exchange Act so provides in § 9(e), 15 U.S.C. § 78i(e), and § 18(b), 15 U.S.C. § 78r(b).[12] In interpreting the implied right of action under § 10(b) this Court looks to such analogous express rights in the securities acts. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773, 2780 (1991), applying express statute of limitations provisions of Exchange Act §§ 9 and 18 to determine the limitations period under § 10(b).

Just as Exchange Act §§ 9 and 18 were applicable to the statute of limitations for § 10(b) actions (*see Lampf, supra*), those sections, along with Securities Act § 11(f), are applicable to confirm the existence of a right of contribution under § 10(b).

Furthermore, all of these securities law express contribution sections permit wrongdoers, *who knowingly or recklessly commit fraud*, to obtain contribution.[13] Thus, the argument in Petitioners' brief (at p. 20) that wrongdoers are not intended to "benefit" from the securities laws is

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[12] The Securities Act and the Exchange Act can be examined in conjunction in order to discern congressional intent behind the securities laws, since they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). A cumulative construction of the securities laws also effectuates their broad remedial purposes. *Herman & MacLean*, 459 U.S. at 386.

[13] While Securities Act § 11 allows liability for conduct that is merely negligent, its contribution provision expressly prohibits a person guilty of fraudulent misrepresentation from recovering contribution from any person not guilty of such conduct. However, a person guilty of fraudulent misrepresentation could clearly obtain contribution from another who is guilty of the same conduct.

mistaken, as well as misleading. Wrongdoers with scienter can "benefit" under the explicit contribution sections of the securities laws.

As discussed below in Section III(C), however, the congressional intent was not to "benefit" wrongdoers, but to deter wrongdoing by facilitating the process of bringing all wrongdoers to justice through contribution. Congress determined that the benefits of contribution under the legislative scheme of the securities laws outweighs the drawbacks of ameliorating liability of wrongdoers.

C. The Underlying Statutory Purposes To Protect The Securities Markets And Deter Wrongdoing Support A Right Of Contribution

Deterrence of wrongdoing through contribution protects the securities markets, and thus supports the statutory scheme of the securities laws.

In fact, this Court has already recognized that suits between wrongdoers under the securities laws supports the goals of the underlying statutory scheme.[14] As stated in *Pinter v. Dahl*, 486 U.S. 622, 636 (1988):

> Refusal of relief to those [who are at fault, but] less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment.

1. Section 10(b) Is Aimed At Deterrence

The purpose of the Exchange Act is to ensure the integrity of the securities markets, not merely to protect individual investors. The language of § 10(b) itself provides that it is not only to "protect investors," but also to protect the "public interest."

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[14] *See* discussion regarding *in pari delicto* cases below at Section V of this Brief.

Thus, § 10(b) mandates:

> [A] careful balancing of competing interests . . . "the term 'public interest' . . . requires the Commission . . . to take into consideration the welfare of the economy as a whole" . . . the SEC "must be careful not to erect such burdensome requirements as to discourage the raising of the capital necessary to the growth of business and industry."

Daugherty, *Rethinking the Ban on General Solicitation*, 38 Emory L. J. 67 n.107 (1989), quoting Gadsby, *The Securities and Exchange Commission and the Financing of Small Businesses*, 14 Bus. Law. 144, 145 (1958).

Deterrence is the tool used by the Exchange Act to protect the securities markets. "[T]he Securities Act is more concerned with prevention than cure." *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969); "[T]he main objective of the federal securities laws is to deter future misconduct rather than compensate the injured party." *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 610 (N.D.Ill. 1987).

2. Congress Intended Contribution To Promote Deterrence

Contribution is aimed at deterrence of wrongdoers.

> Recognition of the right [to contribution] reflects the view that when two or more persons share responsibility for a wrong, it is *inequitable* to require one to pay the entire cost of reparation, and it is sound policy to *deter* all wrongdoers by reducing the likelihood that any will entirely escape liability.

Northwest Airlines, 451 U.S. at 88 (emphasis added).

Furthermore, in the context of § 10(b) the deterrence of bringing all wrongdoers to court through contribution is not substantially lessened by allowing wrongdoers to reduce their liability through contribution. This is because in § 10(b) suits defendants generally face huge

potential liability even if reduced by contribution. Adamski, *Contribution and Settlement in Multiparty Actions under Rule 10b-5*, 66 Iowa L. Rev. 533, 540-41 (1981) [hereinafter *Adamski*].[15]

Thus, the Exchange Act's statutory scheme of deterrence supports the right of contribution under § 10(b).

D. Statutory Authorization Of Contribution "As In Cases Of Contract" And Contractual Underpinnings Of The § 10(b) Action Support A Right Of Contribution

Contribution has traditionally been permitted in contract actions at common law, regardless of its traditional limitations in tort law. Ruder, *Multiple Defendants in Securities Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 647 (1972) [hereinafter *Ruder*]. The contractual basis for the explicit rights of contribution under the securities laws, plus the contractual underpinnings of the § 10(b) private right of action, thus support a right of contribution under § 10(b).

The explicit contribution provisions in Securities Act § 11(f), 15 U.S.C. § 77k(f), and Exchange Act § 9(e), 15 U.S.C. § 78i(e), and § 18(b), 15 U.S.C. § 78r(b), all contain the key phrase "may recover contribution as in cases of contract." While at common law, contribution in cases of

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[15] "In actions under section 10(b), particularly class actions involving open market trading, the amount of potential damages is difficult to predict and, because of the likelihood of numerous plaintiffs, will generally involve substantial sums of money [fn. omitted]. Thus, it appears unlikely that a potential violator of Rule 10b-5 would discount even a remote possibility of liability for total damages as a small loss. On balance it seems that the court's allowance of contribution, which thus provides a more probable threat of liability even though for only a portion of total damages, better serves the deterrent purposes of the securities laws than would a rule prohibiting contribution." *Adamski* at 540-41.

contract was allowed, no contribution right was held to exist among tortfeasors. *Ruder* at 647. Thus, Congress drew from contract law, and intended to create a framework in the securities laws where contribution would be permissible as in contract law.

The § 10(b) private right of action is itself based, in part, on the *contractual rights* of the parties to a purchase and sale of securities. "One of the justifications advanced for implication of a cause of action under § 10(b) lies in § 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), providing that a contract made in violation of any provision of the 1934 Act is voidable at the option of the deceived party." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975). It is this contractual nature of the § 10(b) right of action that limits the right to purchasers and sellers of securities. *Ibid.*

Since the § 10(b) right of action is contractual in nature, the traditional right of contribution applicable to contract actions should also apply under § 10(b).

E. Congress Intended To Create An Independent Federal Regulatory Scheme Under The Securities Laws, So The Existence Of State Remedies Does Not Limit Federal Contribution

Section 10(b) and its companion antifraud provisions under the federal securities laws are part of a distinct statutory scheme to expand the common law. "[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S. at 744-45. "Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protection by establishing higher standards of conduct in the securities industry." *Huddleston*, 459 U.S. at 389.

"All [the securities law antifraud provisions] are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's

commercial universe instead of being subjected to the vagaries of independent and diverse state statutory regulations." *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1375 (9th Cir. 1988) (Aldisert concurring).

Thus, the implied right of contribution under § 10(b) is necessary to complete the federal statutory scheme under the securities laws, regardless of any right to contribution under common law.

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), is therefore misleadingly cited by Petitioners' *Amicus* for the proposition that a private action should not be implied under the securities laws where unnecessary to their purposes. *Santa Fe* held it was improper to federalize a cause of action for breach of fiduciary duty to override state corporations law. *Id.* at 478-79.

In this case, the Court is not being asked to federalize state law, but to recognize contribution under § 10(b) as part of the distinctly federal framework of the securities laws.

IV.

NORTHWEST AIRLINES AND *TEXAS INDUSTRIES* ARE NOT CONTROLLING: THE SECURITIES LAWS, UNLIKE THE CIVIL RIGHTS AND ANTITRUST LAWS CONSIDERED IN THOSE CASES, REQUIRE IMPLIED CONTRIBUTION IN ITS STATUTORY SCHEME

Northwest Airlines[16] and *Texas Industries*[17] clearly are not controlling herein, since the statutes involved in those cases *unlike the Exchange Act*, (1) do not contain any explicit contribution provisions, and (2) never gave rise to well-settled precedent supporting a right to contribution. Not only are *Northwest Airlines* and *Texas Industries*

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[16] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981).

[17] *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

not controlling, but as explained below, the reasoning of those cases actually supports a right of contribution under § 10(b).

A. The Holdings Of *Northwest Airlines* And *Texas Industries* Should Be Confined To The Statutory Schemes Considered Therein

1. *Implied Contribution Is Still Recognized Under Other Statutory Schemes*

The simplistic view that *Texas Industries* and *Northwest Airlines* mandate rejection of every implied right of contribution in the face of statutory silence is simply wrong. For example, in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985), Judge Posner specifically held that there was a right of contribution among ERISA plan fiduciaries sued by plan members or beneficiaries, notwithstanding the absence of an express authorization for a contribution action in the text of the statute.

Thus, as discussed in the cases subsequent to *Texas Industries* and *Northwest Airlines* upholding the right of contribution under § 10(b) (as discussed in Section IV(D) below), the holdings of *Texas Industries* and *Northwest Airlines* should be confined to the statutory schemes specifically considered therein.

2. *Since § 10(b) Involves An Implied Right Of Action, We Look To The Statutory Scheme To Analyze Contribution*

While express statutory rights of action may require express contribution rights, express wording in support of contribution is certainly not required for implied actions. In fact, it would be "incongruous" to look for such express wording for an implied right. *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. at 616.

The general approach of *Texas Industries* and *Northwest Airlines* – that if Congress had wanted a right of contribution, they would have so provided – may be

suitable for the explicit rights of action considered therein, but is inappropriate in the context of an implied right such as that under § 10(b). *Id.* at 615, 616.

Similarly, Petitioners' argument that there is no "textual" support for the implication of a right of contribution under § 10(b) (Petitioners' Brief pp. 19-20) is invalid, because the § 10(b) right of action is itself implied, and non-"textual." Thus, such "textual" support for the right of contribution, in the sense of specific wording in § 10(b) itself, would be improbable, given that Congress never even considered a private right of action when originally enacting that section.[18]

The error of requiring specific statutory wording in the § 10(b) context was noted in *Blue Chip Stamps*, 421 U.S. at 737, stating "it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5." Similarly this Court recognized again last year the nontraditional origins of the § 10(b) cause of action noting that it made no pretense that it was Congress' original intent to provide the remedy afforded. *Lampf, Pleva, Lipkind, Prupis & Petigrow*, 111 S. Ct. at 2780.

A failure to include a right of contribution in a statute providing for an *express* private right of action may indicate Congress' desire not to include such a remedy, but in the case of an *implied* private right of action, such conclusion would be in error. *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. at 616.

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[18] Congress has, however, ratified court law regarding the private rights of action under § 10(b), including the right of contribution, as discussed in Section II of this Brief.

B. The Securities Laws Scheme, Unlike The Statutes In *Northwest Airlines* And *Texas Industries*, Explicitly Allows Wrongdoers To Obtain Contribution For Purposes Of Deterrence

1. *The Securities Laws' Explicit Contribution Provisions Show Wrongdoers Can Sue In Order To Promote Deterrence*

The explicit securities laws contribution provisions show that Congress intended to enable wrongdoers guilty of scienter to sue for contribution under those statutes.

In contrast, *Northwest Airlines* and *Texas Industries* ruled against contribution under statutes containing no express contribution provisions whatsoever.

Thus the reasoning in those cases that the parties seeking contribution could not obtain it because not within the class protected by the statutes therein,[19] and Petitioners' analogous argument that wrongdoers are not entitled to "benefit" under the securities laws, is inapplicable to this case. The express contribution sections of the securities laws show that wrongdoers with scienter can benefit from contribution under the securities laws.[20]

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[19] *Northwest*, emphasized that Title VII of the civil rights laws was enacted solely to establish statutory rights of employees vis-a-vis their employers, and held that employer *Northwest* would not be a "beneficiary" under the statute and was thus barred from seeking contribution. *Northwest* at 91-95.

Similarly, *Texas Industries* held that the treble damages provisions of the antitrust laws indicated an intent to punish, not to ameliorate the liability of wrongdoers. Thus, it refused to imply a right of contribution under those laws. *Texas Industries* at 639.

[20] The holding in *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992) which has caused the divergence among the circuits leading to this appeal, is fully based on the holdings of *Texas Industries* and *Northwest Airlines*, and adds nothing to the reasoning of those cases. Accordingly, *Chutich* is rebutted through the discussions of those cases herein, but is not separately discussed.

2. *Absence Of Punitive Damages Under § 10(b) Shows A Design To Deter, Not Punish, In Contrast To Antitrust's Treble Damages*

Since the securities laws lack punitive damage provisions and are intended to deter rather than punish, contribution under § 10(b) is proper.

Texas Industries, 451 U.S. at 639, emphasized that the treble damages provisions of the antitrust statute cut against permitting contribution under that law, stating "[t]he very idea of treble damages reveals an intent to punish past, and to deter future unlawful conduct, not to ameliorate the liability of wrongdoers."

Punitive damages are impermissible under the Exchange Act, as provided in 15 U.S.C. § 78bb(a).[21] Punitive damages have been specifically disallowed under § 10(b). *deHaas; Huddleston*, 640 F.2d at 559; *Petrites v. J.C. Bradford & Co.*, 646 F.2d 1033, 1036 (1981).

Thus, unlike the antitrust laws under which *Texas Industries* ruled contribution improper, the securities laws are not based on intent to punish, but to deter, and they explicitly provide for contribution as a means to that end.

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[21] "[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of." 15 U.S.C. § 78bb(a).

3. *The Argument That Wrongdoers Should Not "Benefit" From Contribution Is A Red Herring: Congress Has Determined That The Benefits Of Contribution In Promoting Deterrence Outweigh Any Drawbacks Of Benefitting Wrongdoers*

The argument that wrongdoers should not be permitted to "benefit" from the securities laws is misleading. Respondents are not arguing that wrongdoers should so benefit. Instead, Respondents contend that the usefulness of contribution in furthering the policy of deterrence *outweighs* any drawbacks of benefitting wrongdoers by ameliorating their liability.

As discussed in Section III(C) above, the explicit contribution sections in the securities laws reflect a legislative determination that any benefit provided to wrongdoers by contribution is more than offset by the protection contribution affords to the securities markets, through its deterrent effect.

C. Unlike The Statutes Considered In *Northwest Airlines* And *Texas Industries*, The Securities Acts Are Not Comprehensive, Which Is Why A § 10(b) Remedy Is Implied

Since the securities laws are not comprehensive, and use implied rights under § 10(b) and other sections to fill the interstices of the statutory scheme, this Court's rejection of rights to contribution in considering other, more comprehensive statutory schemes, is inapplicable here.

Northwest Airlines and *Texas Industries* reasoned that the statutory schemes considered there were comprehensive in nature, so that further private rights of action, such as a right to contribution, could not be implied.

In *Northwest Airlines* this Court noted, "The comprehensive character of the remedial scheme expressly fashioned by Congress [under the Equal Pay Act and Title VII] strongly evidences an intent not to authorize additional remedies" such as contribution. *Northwest Airlines*, 451 U.S. at 93-94.

Similarly, in *Texas Industries* this Court held that the detailed and specific treble damages provisions of the antitrust laws showed that Congress had enacted a comprehensive legislative scheme with an integrated system for enforcement, and deliberately omitted a right to contribution from that scheme. *Texas Industries*, 451 U.S. at 640-45.

Under the securities laws, in contrast, it is uniformly acknowledged by this Court that Congress did not enact a comprehensive scheme, so that implied rights of action, including the implied right of action under § 10(b) and SEC Rule 10b-5, are needed to close gaps in that scheme. "Rule 10b-5 was adopted in order to close 'a loophole in the protection against fraud . . . by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.' See SEC Release No. 3230 (May 21, 1942); remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967)." *Blue Chip Stamps*, 421 U.S. at 736 n.8.

Since the express federal securities law scheme is not completely comprehensive, the reasoning applied in *Northwest Airlines* and *Texas Industries* regarding such comprehensive schemes is inapplicable to contribution under § 10(b).

D. A Number Of The Post-*Northwest Airlines* And *Texas Industries* Cases Have Specifically Held That Those Cases Do Not Limit Contribution Under § 10(b)

Not only has the overwhelming weight of case law since *Northwest Airlines* and *Texas Industries* supported

contribution under § 10(b) (*see* footnote 3, *supra*), a number of significant cases have specified that the holdings of *Northwest Airlines* and *Texas Industries* do not limit contribution under § 10(b).

In Re National Student Marketing Litigation, 517 F. Supp. 1345, 1348 (D.D.C. 1981) held that the defendant could not rely on *Texas Industries* and *Northwest Airlines* to limit contribution under § 10(b), because the holdings of those two cases applied only to the two statutory schemes therein.

Noonan v. Granville-Smith, 532 F. Supp 1007, 1008 (S.D.N.Y. 1982), *opinion supplemented* by 535 F. Supp. 333 (S.D.N.Y. 1982), rejected the argument that the Second Circuit precedent supporting contribution under § 10(b) had to be disregarded in light of *Texas Industries* and *Northwest Airlines*. Similarly, see *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 885 (D.N.J. 1984).

Most recently, *Baker v. BP America, Inc.*, 749 F. Supp. 840 (N.D. Ohio 1990) rejected the argument that *Northwest Airlines* and *Texas Industries* foreclosed the implied right of contribution under § 10(b), noting that the express statutory remedies therein were different than the legislative scheme provided by the securities laws.

Thus, the weight of precedent rejects Petitioners' reliance on *Northwest Airlines* and *Texas Industries*.

V.

THIS COURT HAS ALREADY DETERMINED, IN LIMITING THE *IN PARI DELICTO* DEFENSE, THAT SUITS BETWEEN WRONGDOERS ARE PERMISSIBLE, AND SERVE IMPORTANT PURPOSES UNDER THE SECURITIES LAWS

A. Contribution Should Be Permissible For Suits Between Culpable Parties As Set Forth By This Court's *In Pari Delicto* Precedents

The right of contribution is the flip side of the *in pari delicto* defense, since both involve suits between culpable parties. "[T]he common-law rule against contribution

from co-conspirators . . . was grounded on the premise that parties generally *in pari delicto* should be left where they are found." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 316 n.28 (1985).

This Court's limiting of the *in pari delicto* defense under the securities laws, because suits between culpable parties will "best promote the primary objective of the federal securities laws" (*Bateman*, 472 U.S. at 315), supports the right of contribution under § 10(b).[22] Any further limitation on suits between wrongdoers – through a separate limitation on contribution actions, would only limit suits already determined in *Bateman* and *Pinter* to be useful and proper.

B. This Suit Furthers The Purposes Of Actions Between Wrongdoers Approved In *Bateman*

1. *Contribution Suits Expose Wrongdoing Among Insiders Which Would Otherwise Go Undetected*

Suits between wrongdoers "will best promote the primary objective of the federal securities laws – protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'" *Bateman*, 472 U.S. at 315.

> Such suits are necessary to ferret out wrongdoers.
>
> [B]arring private actions in cases such as this would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied. . . . [I]t is particularly important to permit "litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily

[22] While *Bateman* was a suit between a tipper and tippee, this Court stated that "*Bateman* provides the appropriate test for allowance of the *in pari delicto* defense in a private action under any of the federal securities laws." *Pinter*, 486 U.S. at 635.

> subject to appropriate civil, administrative, and criminal penalties."

Ibid.

Private insider advice is difficult for an outsider to uncover, especially when subject to attorney-client privilege.[23]

Moreover, suits between culpable parties deter the insiders most responsible for fraud. As stated in *Bateman* albeit in the insider trading context, "we believe that deterrence of insider trading most frequently will be maximized by bringing enforcement pressures to bear on the sources of such information – corporate insiders and broker-dealers." *Id.* at 316. Enforcement of the securities laws depends on lawyer and accountant insiders, such as the defendants herein, giving appropriate counsel to issuers. Corporate insiders are "more responsive to the deterrent pressure of potential [securities law] sanctions *[precisely because] they are more likely than ordinary investors to be advised by counsel and thereby to be informed fully of the allowable limits on their conduct*" (emphasis added). *Id.* at 317. Thus, deterring fraud by lawyers and accountants is crucial.

2. *This Suit Illustrates The Important Purposes Served By Contribution Suits Under The Securities Acts*

This suit uncovers wrongdoing of professional advisers – lawyers and accountants – which would have been undetected if not for this suit. Also, the defendant

[23] Obtaining evidence in discovery which is covered by the attorney-client privilege, under the fraud exception to that privilege, requires making a *prima facie* case that the fraud exists, a threshold showing which may prove impossible to an outsider. *See, e.g., In Re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987), requiring such a *prima facie* showing.

lawyers and accountants herein were those most responsible for the fraud. Dependence on such advisors is particularly clear in this case, involving compliance with technical, but important, securities law requirements.[24]

C. This Suit Meets This Court's Criteria For Permitting Suits Between Wrongdoers, As Set Forth In The *In Pari Delicto* Cases

1. *The* Bateman *Two-Pronged Test For Suits Between Culpable Parties*

Under *Bateman*, the *in pari delicto* defense can block suits between culpable parties "only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Bateman*, 472 U.S. at 310.

Accordingly, such suits should be permitted in a contribution context where (1) the defendant "bears at least substantially equal responsibility for the violations," and (2) the suit would promote enforcement of the securities laws and/or protection of the investing public. This case meets both prongs of this test.

2. *The First Prong Of The Test Is Met: Petitioners Bear Primary Responsibility For The Violations*

The first prong of the *Bateman* test requires that the culpable defendant "must be an active, voluntary participant in the unlawful activity. . . . [C]ourts frequently have

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[24] *See, e.g.*, First Amended Complaint ¶¶33(a) and 33(b) at J.A. pp. 18-19, referencing SEC regulations concerning disclosure of risk factors in the public offering, and First Amended Complaint ¶40 at J.A. pp. 27-8, referencing SEC and Generally Accepted Accounting Principles requirements for disclosure of a change in accounting method for revenue recognition.

focused on the extent to which the plaintiff and the defendant cooperated in developing and carrying out the scheme" violating the securities act. *Pinter*, 486 U.S. at 636.

Clearly, scienter is a major, if not the principal, criterion for evaluating blameworthiness. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 (1976). Herein, Cousins' accountants and attorneys were primarily responsible for advising Cousins on legal requirements for its public offering, and thus had a level of scienter which the issuer itself could not have had. (Complaint ¶¶31-2 at J.A. pp. 17-19; ¶¶34-6 at J.A. pp. 23-5.)[25]

Even assuming the Cousins corporate insiders knew the undisclosed facts, they could not have known the applicable disclosure requirements which their lawyer and accountant advisors knew, or should have known. *Thus, the lawyer and accountant defendants are at least as culpable as the Plaintiffs' subrogors – the Cousins entity and corporate insiders.*

3. *The Second Prong Is Met*

Preclusion of this suit would impede both major policies under the federal securities acts: protection of investors and protection of the integrity of the securities markets.

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[25] In conjunction with that Cousins offering, the attorney defendants (i.e. the Musick firm, Castro and Schuchard) "actively concealed and failed to disclose or caused the failure to disclose, or caused to be misrepresented or concealed" various matters in violation of specific SEC regulations (Complaint ¶33 at J.A. pp. 19-23).

Similarly, in connection with that same Cousins offering, the accountant defendants (i.e. Main and Cohn) "assisted MUSICK in the preparation and filing of the COUSINS Prospectus and, as a result of their participation and investigation into the business operations and prospects and financial, accounting and management controls and systems of COUSINS, knew or recklessly disregarded the false and misleading nature of the financial information contained in [the] COUSINS prospectus." (Complaint ¶36 at J.A. pp. 24-5.)

The only possible liability of the subrogors was vicarious, through imputation to them of the conduct of their lawyers and accountants. As continually maintained by plaintiffs, it was Cousins' attorneys and accountants who knowingly or recklessly violated legal requirements.

The securities laws were aimed at "establishing higher standards of conduct in the securities industry." *Herman & MacLean*, 459 U.S. at 288-89. Since attorneys and accountants play an ongoing role in issuance of securities, private enforcement actions against them are crucial.

Moreover, in this case, Cousins and its lawyers and accountants all owed a duty to the investing public, but the lawyers and accountants also owed Cousins various fiduciary duties.[26] Blocking suits between culpable parties is inappropriate where the culpable defendant owed a fiduciary duty to the plaintiff[27]. *Bateman*, 472 U.S. at 306. Fraud in the securities industry is "particularly egregious when committed by a securities professional, who owes a duty of honesty and fair dealing toward his clients." *Id.* at 314. Thus, deterring such egregious conduct, through this lawsuit, clearly furthers the public interest.

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[26] Compare *Bateman*, where the tippee was permitted to sue the tipper providing insider information, in part because the tipper had "a broader range of potential violations" than the tippee. Although the tipper and the tippee were both potentially liable for defrauding the investing public, the tipper was also responsible for breach of fiduciary duty to the issuer and for defrauding the tippee. *Bateman*, 427 U.S. at 313.

[27] This Court noted that "a confidential relationship between" the parties would determine their "relative standing" before the court, so that although both culpable, the parties would not be considered, in relation to each other, *in pari delicto*. *See, Bateman*, 472 U.S. at 306, citing 3 J. Pomeroy, *Equity Jurisprudence* § 942a, p. 741 (5th Ed. 1941).

VI.

POLICY CONSIDERATIONS SUPPORT THE IMPLICATION OF THE RIGHT OF CONTRIBUTION UNDER § 10(b)

A. Policy Support For The Right Of Contribution Should Be Considered

This Court consistently holds that policy should be considered in ruling on the scope of the private right of action under § 10(b). As noted in *Blue Chip Stamps*, "[i]t [was] therefore proper that we consider, in addition to the factors already discussed, what may be described as *policy considerations* when we come to flesh out the portions of the law with respect to which neither congressional enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737 (emphasis added).

Thus, this Court should consider that the policies underlying the securities laws strongly support upholding contribution under § 10(b).

B. Contribution Promotes The Deterrent Effect of the Securities Laws

Not only did Congress intend deterrence as the goal of contribution (as discussed in Section III(C) above); as a matter of policy, contribution does, in fact, promote deterrence.

Courts, commentators, and most modern studies have concluded that increasing the *certainty* of punishment, as contribution does, deters wrongdoing more effectively than increasing the *severity* of punishment – the effect of a "no contribution" rule. Langmore and Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 1991 Emory L.J. 1015, 1074, 1074 n.304 (1991) [hereinafter *Langmore and Prentice*]; *Adamski* at 540. Without contribution, wrongdoers would gamble on the possibility of escaping liability entirely.

C. A Right of Contribution Promotes Fairness

As discussed in Section I. above, when the doctrine of contribution steadily replaced the no-contribution rule in Western law, "fairness" was the main rationale for the adoption of the new rule. *Huddleston*, 640 F.2d at 557.

There are many reasons why the doctrine of contribution is considered "fair." First, as this Court noted in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975), equitable considerations in allocating damages require that liability be assessed according to proportional fault. Similarly, fundamental fairness requires that the financial damage caused by joint tortfeasors be apportioned among them. *Adamski* at 541, citing *e.g., Heizer Corp.*, 601 F.2d at 333; *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

Although fairness dictates that liability be assessed according to fault, joint and several liability threatens defendants with liability for a disproportionate amount of the plaintiff's damages. Contribution avoids this unfairness. *McKinnon v. City of Berwin*, 750 F.2d 1383, 1387 (7th Cir. 1985).[28]

Second, contrary to the assertion of Petitioners and their *Amicus* that fairness should only benefit victims of a fraud, concepts of justice, which involve equality, are violated when several persons are involved in causing the same injury, but only one bears the total loss. Turck, *Contribution Between Tortfeasors in American and German Law – A Comparative Study*, 16 Tul. L. Rev. 1, 10 (1966). Adopting such a rule would produce the irrational result of compelling one or more defendants, who may not have been the primary instigators of the fraud, to bear the

[28] Judge Posner explained in *McKinnon*, 750 F.2d at 1387, an action brought pursuant to 42 U.S.C. § 1983, "the whole point of contribution is to mitigate the effect of joint and several liability, which allows liability to fall disproportionately on one or some group of joint tortfeasors."

entire loss, allowing more culpable wrongdoers to escape liability completely. *Adamski* at 541. The unfairness is exacerbated when a corporate tortfeasor is required to pay the total damages, since then the entire burden of payment would fall on the shareholders. *Ibid.*

> There is an obvious lack of sense of justice in a rule which permits the entire burden of a loss, for which two defendants were equally unintentionally responsible to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E. 2d 437, 442 (Ill. 1978).

Third, there is no justice in tortfeasors escaping liability for a wrong caused by their conduct. *Langmore and Prentice* at 1062.

Fourth, without contribution the parties who will pay the entire burden and those who will escape may be chosen by the plaintiff, through whim, oversight, or collusion with other wrongdoers, and thus would be an arbitrary and unfair manner in which to redress violation of § 10(b). *Adamski* at 541-42 citing *Heizer Corp.*, 601 F.2d at 333.

Finally, contribution has been likened to comparative negligence, which has effects similar to contribution. The primary rationale for the overwhelming adoption of comparative negligence in place of contributory negligence, was "fairness." *Langmore and Prentice* at 1070.

Considerations of justice and fairness should be weighed against the temptation to simplify matters by discarding contribution. "[E]ven if [the] argument [against contribution] were more persuasive than it is, it could hardly be accepted. For, at bottom it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable,

settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage out-of-court accommodations." *United States*, 421 U.S. at 408.

D. Contribution Benefits Both The Plaintiff And The Legal System

Both Petitioners and *Amicus* argue that contribution places unnecessary burdens on litigants and the courts. A more studied look indicates that contribution benefits both plaintiffs and the legal system, by bringing all wrongdoers to justice, providing incentives to disclosure of relevant evidence, and permitting all claims to be resolved efficiently and consistently.

Although, allowing contribution does lessen plaintiff's control of the case, the plaintiff's only legitimate concern is compensation, not who pays it. *Langmore and Prentice* at 1093. If the plaintiff is accorded too much control, it may encourage collusion and bribery between the plaintiff and defendants and potential defendants. Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New branch on the Judicial Oak Threatened by Strict Statutory Construction?* 16 Suffolk U. L. Rev. 983, 988 (1982) [hereinafter *Judicial Oak*]; Note, *Rule 10b-5 Developments – Damages and Contribution*, 39 Wash. & Lee L. Rev. 1016 (1982); *Skinner*, 70 Ill. 2d 1, 374 N.E.2d at 442.

The Securities Acts of 1933 and 1934 were passed in large part to protect investors, who usually become plaintiffs in these suits. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963); *Straley v. Universal Uranium & Milling Corp.*, 239 F.2d 370, 372 (9th Cir. 1961). It is well established that the enforcement of the securities laws is dependent in large part on suits brought by these private litigants. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 456 U.S. at 380.

These plaintiffs generally sue as many defendants and under as many theories as possible. *Langmore and Prentice* at 1094. This is not necessarily a bad thing for the ultimate administration of justice because by the time defendants are done pointing their fingers at each other, they may have gone a long way towards making plaintiff's case. *Id.* at 1095. Defendants who were involved in a common scheme are often in the best position to demonstrate the fault of their confederates. Thus contribution benefits both the plaintiff and the legal system by facilitating discovery. *Judicial Oak* at 988.

Admittedly, contribution may increase the costs of litigation, but this argument should be rejected because of the other benefits received under contribution and the related doctrine of comparative negligence. *Langmore and Prentice* at 1094.

"The common law rule precluding intentional wrongdoers from seeking contribution developed long before the evolution of multiparty litigation involving class plaintiffs, numerous defendants, vast monetary claims, lengthy trials, and enormous litigation costs." *Huddleston*, 640 F.2d at 558. Since the judicial system has evolved in the aforementioned respects to accommodate complex litigation, it is now well-prepared to bring all wrongdoers to justice through contribution.

E. Contribution Does Not Discourage Settlement

Petitioners and *Amicus'* contention that contribution discourages settlement is, at best, unsubstantiated. As in this case, contribution can facilitate settlement by permitting the party who pays the settlement, but has limited culpability, to recover from other, more culpable parties.

Also, problems regarding settlement can be addressed by court determinations that a good faith settlement bars further contribution by the settling parties. *See, e.g., Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-29 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 232 (1990).

In any case, it is questionable whether encouragement of settlement through disallowance of contribution produces desirable settlements. Instead, disallowance of contribution may create a stampede to settle for a disproportionately small amount to shift the burden of liability to other defendants.

> The disallowance of contribution in the context of such modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will, merely to avoid the heavy cost of litigation, pay a settlement amount rather than defend the action. Thus, the no-contribution rule promotes a rush to settlement whereby certain defendants can purchase freedom from litigation and the ultimate court judgment, simultaneously providing the plaintiffs with funds to finance the continuation of the suit against the non-settling defendants. Moreover, the settling defendants may well extricate themselves from the litigation in exchange for relatively small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment.
>
> Persons injured by the willful torts or deceit of others are entitled to full redress but should not be able to play one defendant against another as a gambit. Although the law favors compromise as a means of ending litigation, the type of settlement that is reached on the basis of the denial of contribution neither terminates the litigation nor furthers the goal of efficient court administration.

Huddleston, 640 F.2d at 558.

Thus, given the availability of court contribution bars, contribution will not interfere with good faith settlements. Contribution may interfere with settlements which are unjust, but such settlements, in any event, should not be supported by policy.

F. Recognizing The Right To Contribution Under § 10(b) Will, By Promoting Investor Confidence, Further The Goal Of Efficient Capital Formation

The many disparate rules of Congress and holdings of this Court relating to § 10(b) each involve a careful balancing which optimizes "the public interest" and "investor protection" in accordance with the legislative mandate of § 10(b). Some compromises have involved subordination of "the public interest" to "investor protection" while other compromises have had the opposite effect. The result has been an *overall balance* between the two which has carried out the intent of Congress.[29]

The securities laws were adopted at least as much to support the securities markets by promoting investor

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[29] This balancing process is reflected in case law under § 10(b). The need for investor protection is recognized by § 10(b)'s expansion of liability beyond common law fraud. Since Rule 10b-5 violations can be established with a lesser burden of proof than is necessary to establish common law fraud in many states (*Herman & MacLean*, 459 U.S. at 390), Rule 10b-5 promotes investor protection in an independent way unavailable under State common law. Similarly, this court went substantially beyond common law fraud's requirement of direct reliance on misrepresentations in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), which adopted the "fraud on the market" presumption of reliance for Rule 10b-5 cases where securities are traded on an efficient market.

At the same time, to avoid chilling the capital formation markets, the 10b-5 plaintiff must prove "scienter," a highly culpable mental state (*Ernst & Ernst*, 425 U.S. at 212), and must qualify as a purchaser or seller of the subject securities (*Blue Chip Stamps*, 421 U.S. at 744), and is not entitled to punitive damages. 15 U.S.C. § 78bb(a). These aspects of 10b-5 jurisprudence are more restrictive than common law fraud, which may allow claims for negligent misrepresentation (*see, e.g.*, Cal. Civ. Code § 1709), does not restrict the class of plaintiffs solely to purchasers or sellers (*Ernst & Ernst*, 425 U.S. at 744), and awards punitive damages. *See, e.g.*, Cal.Civ.Code § 3294

confidence as to protect individual investors. "The federal securities laws were enacted for the purposes of restoring investor's confidence in financial markets, *Marine Bank v. Weaver*, 455 U.S. at 555, 102 S. Ct. at 1223, reducing transaction costs associated with a caveat-investor rule, *H.R. Rep. No. 1383, 73d Cong., 2d Sess.* 4-5 (1934), and enhancing the free flow of capital, *Daily v. Morgan*, 701 F.2d 496, 500-02 (5th Cir. 1983)." *Futura Development Corp. v. Centex Corp.*, 761 F.2d 33, 40 (1st Cir. 1985).

The drafters of the securities laws recognized the direct link between investor confidence and the willingness of investors to provide investment capital which can keep our economy growing. Thus, registration was required for public securities offerings, in order "to protect honest enterprise . . . ; to restore the confidence of the prospective investor . . . ; to bring into productive channels of industry and development capital which has grown timid . . . ; and to aid in providing employment and restoring buying and consumer power." *S.Rep. No. 47, 73d Cong., 1st Sess.*, 1 (1933), quoted in *Pinter*, 486 U.S. at 638 n.14.

Allowing joint wrongdoers under Rule 10b-5 to seek contribution from other joint wrongdoers whom the Plaintiff elected not to sue, will ultimately serve and promote the primary objectives of Congress by benefitting the economy as a whole *and* by protecting investors.

If the investing public sees wrongdoers who violated Rule 10b-5 escape all punishment, public confidence in the integrity of our markets and the "level playing field" which all investors are entitled to expect will be impaired.

This chilling of investor confidence will be particularly strong where the wrongdoers who escape all liability are, as in the present case, lawyers and accountants who will continue their active relationship with the securities markets by drafting future prospectuses and disclosure documents for other publicly traded companies, or by certifying financial statements for other publicly traded companies, long after having damaged the Cousins investors.

Each time a wrongdoer escapes liability based upon the "no contribution" rule for § 10(b), investor confidence will be chilled, investment activity will be slowed, investors will abandon the capital markets, and the ability of businesses to turn to those markets for capital will be impaired. Allowing contribution actions among 10b-5 violators assures investor confidence and vigorous investment, the very goals which Congress sought to implement in § 10(b).[30]

Thus, in the § 10(b) context, allowing contribution among joint tortfeasors would (1) promote public confidence in the capital formation markets, leading to heightened investment; and (2) promote deterrence of other potential wrongdoers by assuring that no violator of Rule 10b-5 escapes punishment. A rule denying contribution would (1) chill the capital formation markets and drive risk averse investors from the capital markets; and (2) minimize the deterrent effect of the securities laws. *Cf.* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 So. Cal. L. Rev. 726, 730-34 (1968); *see also In Re Oil Spill by the Amoco Cadiz*, 699 F.2d 909, 915 (7th Cir. 1983).

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[30] Petitioners' very theoretical arguments regarding the lack of need for additional deterrence of securities fraud should be considered in light of the urgent real need for deterrence. The 1980's witnessed the emergence of entirely novel methods of securities fraud, including tax shelters, greenmail and "junk" (i.e. non-investment grade) bonds. *See, e.g., Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (tax shelter); *In Re Phillips Petroleum Securities Litigation*, 738 F. Supp. 825 (D.Del. 1990) (greenmail); *United States v. Milken*, 759 F. Supp. 109 (S.D.N.Y. 1990) (junk bonds). These novel devices diverted funds from productive investment, significantly contributed to our low national savings and investment rate, and weakened this country's competitiveness in the world economy.

G. Fraud Imposes Economic Costs On The Securities Markets Greater Than The Losses Suffered By Individual Investors, Thereby Justifying Contribution

In examining contribution, one might ask what difference it makes to the wronged investor if there is contribution, as long as that investor can obtain compensation for his injury.

Fraud, however, imposes costs on the securities markets in addition to the losses to the defrauded investor. As noted by Professor Posner:

> [T]here is a social cost from securities fraud, albeit not a cost equal to the losses of the shareholders who were hurt by the managers' concealment. Three kinds of social cost in fact are possible, though all are difficult to quantify. First, the managers may have expended real resources on concealing the bad news. Second, and related, if fraud is prevalent, investors will have an incentive to expend more resources on trying to find out the truth about firms, because they have to overcome the disinformational efforts of corporate managers. (This is a major reason, by the way, why theft is not a simple transfer payment, but inflicts net social costs.) Third, the prevalence of fraud may make the stock market more volatile, imposing disutility on the risk-averse investor.

Posner, *Law and Theory of Finance: Some Intersections*, 54 Geo. Wash. L. Rev. 159, 170 (1986).

Professor Posner finds that such costs justify the fraud on the market cause of action, thus further indicating that it is efficient to deter such costs through legal actions in general, including contribution.

Not only does deterrence of such costs provide economic justification for a contribution action; deterrence of such costs also fulfill's Congress's legislative determination to protect the overall welfare of the securities markets, as discussed above.

Accordingly, in light of the applicable public policies, this Court should reaffirm the right of a Rule 10b-5 defendant to seek contribution from joint wrongdoers, a method of recovery embraced by the overwhelming majority of the federal courts.

VII.

THIS COURT SHOULD NOT OVERRULE *FRANKLIN V. KAYPRO*

Certiorari was granted to review only one issue – whether an implied right of contribution exists under § 10(b). In granting *certiorari*, this Court has never agreed to review the holding of *Franklin*. The urging of Petitioners' *Amicus* that *Franklin* be overruled should therefore remain unaddressed.[31]

Should this Court decide to reach the issue, *Franklin* should be affirmed and made the law in all circuits.

Franklin held that determination of the fairness of a "partial settlement" insulates settling defendants from liability for contribution to non-settling co-defendants. The non-settling defendants, if found liable at trial, are not held liable for that proportion of the total liability which the trier of fact attributes to the settling defendants.

The *Franklin* approach is fair, in that each of the non-settling defendants is liable only for his fair share of damages.

The *Franklin* approach is economically efficient by eliminating enormous transactional costs for the "mini trials" traditionally associated with partial settlements.

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[31] Since this Court has not granted *certiorari* to review the *Franklin* method of apportioning liabililty between settling and non-settling defendants, this issue is *not* fully briefed herein. Given the multiplicity of other issues herein, this case does not present an opportunity for such briefing. Should the Court be interested in considering this issue, Respondents hereby request leave to file a supplemental brief on the subject.

In *Donovan*, 752 F.2d at 1178, Judge Posner suggested a "comparative fault" apportionment rule which is identical to the apportionment and settlement bar mechanisms of *Franklin*. Judge Posner recognized that the rule would confer enormous benefits, because it would avoid complex "fair share" mini-trials for partial settlements, would provide defendants with an incentive to settle, and would leave non-settling defendants liable only for their fair share of the total liability as determined at trial.

Judge Posner explained that the "comparative fault" method would minimize transaction costs involving settlement:

> The comparative-fault [proportionate] rule provides a neat solution to these problems [of high transaction costs to settle]. It encourages settlement by immunizing the settling defendant from liability for contribution but does not require a hearing on the fairness of the settlement to other tortfeasors.

Id. at 1181.

Thus, efficiency and justice both support the *Franklin* method for apportioning loss between settling and non-settling defendants.

VIII.

THIS COURT SHOULD DEFER TO THE SEC'S INTERPRETATION OF THE SCOPE OF RULE 10b-5, AS PRESENTED IN ITS *AMICUS* BRIEF

In *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), this Court has recognized the propriety of deference to an administrative agency's construction of the statutory scheme it oversees.

> If Congress has explicitly left a gap for the agency to fill . . . *a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.*

Id. at 843-4 (emphasis added).

One leading authority has noted that such deference should be paid even to positions taken by administrative agencies' briefs before the courts.

> If the matter at issue is one for which the agency has responsibility, if all requisite procedures have been complied with, and if there is no doubt that the position urged has full and considered approval of the agency head, it is far from self-evident that the agency's views should be denied their accustomed force simply because they are first presented in the prosecution of a lawsuit.

Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 519 (1989).

It is undisputed that Rule 10b-5, a longstanding rule issued by the Securities and Exchange Commission ("SEC") itself, is within that agency's aegis. There is also no doubt that the SEC's *amicus* brief is a deliberate effort produced by the SEC's ongoing *amicus* program.

> The operation of the Commission's amicus program today is much different from the Commission's program in its early years. Not only does it participate in more cases, it is more systematic in choosing the cases in which it will participate.

Ruder, *The Development of Legal Doctrine Through Amicus Participation: the SEC Experience*, 1989 Wisconsin L. Rev. 1167, 1170 (1989).

Thus, the SEC's *amicus* brief filed in support of Respondents herein meets the criteria set forth in the above-quoted article for deference, and therefore should be accorded such deference.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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